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fka SPERIAN ENERGY CORP.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANDREW PERRONG and JAMES EVERETT
SHELTON, individually and on behalf of all others
similarly situated,

Plaintiff,

vs.

TOMORROW ENERGY CORP fka SPERIAN
ENERGY CORP, a Nevada corporation, and
ENERGY GROUP CONSULTANTS, INC., a
Kansas corporation, BAETYL GROUP LLC, a
Texas limited liability company,

Defendants.

Related Cross-Claims and Third-Party Claims.

Case No. 2:19-cv-00115-RFB-EJY

**DEFENDANT TOMORROW ENERGY
CORP FKA SPERIAN ENERGY
CORP'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
SANCTIONS DIRECTED TO
DEFENDANT ENERGY GROUP
CONSULTANTS, INC.**

1 **I. INTRODUCTION.**

2 Tomorrow Energy Corp. fka Sperian Energy Corp. (“Tomorrow Energy” or “Sperian”)
3 hereby opposes the Emergency Motion for Sanctions filed by Plaintiffs Andrew Perrong (“Mr.
4 Perrong”) and James Everett Shelton (“Mr. Shelton”) (together, “Plaintiffs”) (Dkt. No. 113, the
5 “Sanctions Motion”). Plaintiffs seek relief on the ground that Energy Group Consultants, Inc.
6 (“EGC Inc.”) “did not comply with the Court’s order” to produce certain records or provide an
7 affidavit by December 20, 2019. (Dkt. No. 106.)

8 Sperian opposes this Sanctions Motion for three reasons. First, Plaintiffs request sanctions
9 against Sperian, even though Sperian has not violated any discovery order. Second, Plaintiffs
10 bootstrap to the Sanctions Motion an emergency request to modify the Court’s bifurcation order,
11 without following the local rule requiring Plaintiffs to identify the nature of the emergency and even
12 though the requested relief would have no impact on any issue which could lead to early termination
13 of this action. Third, Plaintiffs ask the Court to approve an inspection of two third parties on the
14 same date and time as the EGC Inc. inspection, even though Plaintiffs have yet to subpoena the
15 inspections of the third parties at issue.

16 **II. A PRELIMINARY NOTE ON THE PROPER PARTIES TO THIS SANCTIONS**
17 **MOTION.**

18 Mr. Perrong sued EGC Inc. (*See* Dkt. No. 61.) Mr. Perrong alleges that EGC Inc. called
19 him. (*See generally id.*) Energy Group Consultants, LLC (“EGC LLC”) is a party by virtue of
20 Sperian’s third-party complaint. (*See* Dkt. No. 26.) Mr. Perrong did not sue EGC LLC. (*See* Dkt.
21 No. 61.) Mr. Perrong does not allege that EGC LLC called him. (*See generally id.*) Mr. Perrong
22 has not issued any discovery to EGC LLC.

23 Mr. Shelton did not sue EGC LLC. (*See generally id.*) Mr. Shelton does not allege that EGC
24 LLC called him. (*See generally id.*)

25 The term “EGC” is not defined in the Sanctions Motion. It appears that Plaintiffs intend for
26 the term “EGC” to serve as a catch-all, and that Plaintiffs seek relief against both EGC Inc. and EGC
27 LLC (together, the “EGC Parties”). Moreover, the Sanctions Motion is made by both Mr. Perrong
28

1 and Mr. Shelton, even though Mr. Shelton does not allege that the EGC Parties called him. There is
2 no basis to award any relief against EGC LLC or any relief in favor of Mr. Shelton.

3 Sperian brings these facts to the Court's attention because they are indicative of the cavalier
4 attitude by which Plaintiffs have approached discovery and the local rules. For example, and as
5 discussed below: the sanction Plaintiffs seek would impact not only EGC Inc. but all defendants,
6 including Sperian; Plaintiffs do not include in their declarations of counsel the required statement
7 describing the "nature of the emergency" necessitating modification of the bifurcation order; and
8 Plaintiffs ask the Court to permit inspection of the workstations of two third parties, even though
9 Plaintiffs have not issued subpoenas to inspect the third parties' workstations.¹

10 Sperian takes no position on whether EGC Inc. complied with the Court's order. However,
11 Sperian submits that any such relief awarded by the Court should be narrowly tailored so as not to
12 prejudice Sperian.

13 **III. RELEVANT PROCEDURAL HISTORY.**

14 **A. The Court's November 8, 2019 Order Directed EGC Inc. to Produce Call** 15 **Records and Limited Discovery to the Issue of Vicarious Liability.**

16 The Court held a status conference on November 8, 2019. At Mr. Perrong's request, the
17 Court ordered EGC Inc. to "produce call records, without names, for the period commencing with
18 four years before the filing of the complaint up to one week prior to production" in order to ensure
19 preservation of the records. (Dkt. No. 104.) The Court "further ordered [that] discovery shall be
20 bifurcated." (*Id.*) The Court subsequently clarified that "Phase 1 of discovery is limited to the issue
21 of vicarious liability." (Dkt. No. 111.)

25 ¹ Moreover, Plaintiffs have yet to fully comply with the Court's directive to provide a reasonable
26 inspection protocol prior to Mr. Perrong's inspection of EGC Inc. The parties continue to meet and
27 confer regarding the protocol, and hope to resolve their dispute without the Court's intervention,
28 however the parties have been awaiting a response from Plaintiffs' counsel since December 27,
2019. If the parties are unable to reach an agreement by January 8, 2020, Sperian will seek the
Court's intervention.

B. The Court Subsequently Ordered EGC Inc. to Produce Additional Documents and Provide an Affidavit Regarding Its Efforts.

On December 10, 2019, the Court held a telephone conference to resolve certain issues with respect to Sperian's proposed deposition of EGC Inc. (Dkt. No. 106.) The Court ordered EGC Inc. to produce "all emails, text messages, and call records" for which EGC Inc. previously promised to search by December 20, 2019. (*Id.*) The Court further ordered EGC Inc. to "explain, in writing, how it searched for additional responsive documents, and what, if anything, was located." (*Id.*) Finally, the Court ordered that if EGC Inc. is unable to produce call records by December 20, 2019, EGC Inc. must provide a written explanation of why it "is unable to do so and a date certain that is at least seven (7) days before the inspection for production of such call records." (*Id.*)

IV. THE ADVERSE INFERENCE SANCTION REQUESTED BY PLAINTIFFS IS UNDULY PREJUDICIAL TO SPERIAN.

The relief sought by Plaintiffs is overbroad and not narrowly tailored to the alleged failure by EGC Inc. to comply with the Court's order. Specifically:

Plaintiffs request that the jury be instructed that: EGC had a duty to preserve relevant evidence, including call records during the class period; that this evidence was allegedly destroyed because EGC did not take steps to change a retention policy that apparently only requires EGC's vendors to keep records for 30 to 90 days; as a result, the jury may infer that EGC failed to preserve and destroyed evidence because the evidence would be favorable to Plaintiffs, and unfavorable to Defendants.

(Sanctions Motion, Dkt. No. 113, at Page ID 13-14 (emphasis added).) Sperian is not the subject of the discovery orders directing EGC Inc. to produce certain documents and an affidavit. As Plaintiffs point out, an "adverse inference sanction should be carefully fashioned to deny the wrongdoer the fruits of its misconduct." (*Id.* (citing *In re Oracle Corp. Sec. Litig.*, 627 F. 3d 376, 386 (9th Cir. 2010)).) The alleged wrongdoer, in this instance, is EGC Inc. There is no ground on which to issue an adverse inference that documents unfavorable to all the defendants, including Sperian, may have existed.

Moreover, the relief sought by Plaintiffs is premature: Plaintiffs have not yet demonstrated that EGC Inc. destroyed any evidence. As Plaintiffs note, “[a]n adverse inference instruction may be given upon a finding that the evidence was destroyed after a party was on notice of the potential relevance of the evidence to the litigation.” (Sanctions Motion, Dkt. No. 113, at Page ID 13 (citing *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993)).) There has been no such finding. Plaintiffs have only established that EGC Inc. failed to produce documents and an affidavit by the court-ordered deadline. In fact, Mr. Perrong has yet to conduct his inspection of EGC Inc., the purpose of which is to determine if EGC Inc. destroyed calling records. (See Dkt. No. 105, Tr. of Nov. 8, 2019 Hr., at 29:11-17 (“[W]e have a pending request for inspection to EGC’s headquarters ... because we believe that there is evidence of class-wide calling records [and] there’s been mixed messages about whether or not they exist. So we would like to go in and inspect them ourselves if the Court would allow that.”).)

Accordingly, Plaintiffs’ request for an adverse inference “that EGC failed to preserve and destroyed evidence because the evidence would be favorable to Plaintiffs, and unfavorable to Defendants” should be denied. Sperian respectfully submits that any award issued by the Court should be narrowly tailored to the issue of EGC Inc.’s alleged failure to comply with the Court’s discovery orders.

V. PLAINTIFFS IMPERMISSIBLY SEEK TO EXPAND THE SCOPE OF THE COURT’S BIFURCATION ORDER AND IMPERMISSIBLY SEEK THIRD PARTY DISCOVERY WITHOUT HAVING FIRST ISSUED INSPECTION SUBPOENAS.

Plaintiffs ask the Court to “expand the scope of the January 14, 2020 inspection of EGC to include inspection of the workstations of Tyde Bonaparte and John Williams” and “expand the scope of discovery to the relationship between EGC and Team Integrity, including whether they are alter egos.” (Sanctions Motion, Dkt. No. 113, at Page ID 11.) Each request is procedurally improper.

A. Plaintiffs Do Not Carry Their Burden to Show That the Bifurcation Order Needs to Be Modified on an Emergency Basis.

Plaintiffs improperly seek to “conduct discovery directed to EGC that is beyond the scope of Phase I in order to determine the exact nature of the relationship between EGC and Team Integrity, including whether they are alter egos” (Dkt. No. 113, at Page ID 15) by way of this “emergency” Sanctions Motion. Under LR 7-4, a request for judicial assistance in resolving an emergency dispute must “be accompanied by a declaration setting forth ... the nature of the emergency.” Not one word in the declarations of Plaintiffs’ counsel (Dkt. Nos. 113-1 and 113-2), or even the Sanctions Motion itself, so much as hints at the supposed need to modify the bifurcation order on an emergency basis.

Of course, there is no exigent need to modify the bifurcation order. If Plaintiffs wish to modify the Bifurcation Order, Plaintiffs can do so via regular noticed motion procedure before the close of Phase I discovery; the Court recently extended the deadline to complete Phase I discovery to February 28, 2020 and extended the deadline to file a Phase I dispositive motion to March 31, 2020. (Dkt. No. 106.)

Moreover, Plaintiffs’ request is substantively flawed. This Court bifurcated discovery and limited Phase I to issues of vicarious liability because doing so could lead to the early termination of the action. If Plaintiffs’ theory is correct—and Plaintiffs prove that EGC Inc. and Team Integrity and/or Mr. Bonaparte and Mr. Williams are alter egos of each other—the legal effect would be that Team Integrity and/or Mr. Bonaparte and Mr. Williams are liable for EGC Inc.’s debts. *See Nev. Rev. Stat. § 78.747(1)* (“Except as otherwise specifically provided by statute or agreement, no person other than a corporation is *individually liable for a debt or liability of the corporation* unless the person acts as the alter ego of the corporation.”) (emphasis added); *see also Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1241 (D. Nev. 2008) (“Where the alter ego doctrine applies, ... the two corporations are treated as one for purposes of determining liability ... The effect of applying the alter ego doctrine is that the corporation and the individual who dominates it are treated as one, ‘so that any act committed by one is attributed to both, and if either is bound, by contract, judgment, or otherwise, both are equally bound....’”) (quoting *M/V Am. Queen v. San Diego*

1 *Marine Const. Corp.*, 708 F.2d 1483, 1490 (9th Cir. 1983) and *Dudley v. Smith*, 504 F.2d 979, 982
 2 (5th Cir. 1974)).) Discovery of Plaintiffs’ alter ego theory at this stage would only needlessly
 3 increase costs which may be avoided altogether upon a finding that Sperian is not vicariously liable
 4 for the alleged calls to Mr. Perrong.

5 Accordingly, the Court should deny Plaintiffs’ “emergency” request to modify the
 6 bifurcation order.

7 **B. Plaintiffs Have Not Subpoenaed the Inspections of the Third Parties.**

8 Mr. Bonaparte and Mr. Williams are not parties to the case. On December 3, 2019, Plaintiffs
 9 issued document subpoenas to Mr. Bonaparte and Mr. Williams. (Declaration of Harrison Brown, ¶
 10 2, Exs. 1-2.) In the document subpoenas, Plaintiffs identified certain documents (*see* Schedule A to
 11 the document subpoenas) and asked that the documents be produced “directly to the undersigned
 12 counsel electronically....” (*Id.*) In the notices of intent to serve the document subpoenas which
 13 Plaintiffs circulated to the parties, Plaintiffs advised that “[t]he requested documents are to be
 14 produced December 18, 2019, electronically via Email or Sharefile.” (*Id.*) Neither document
 15 subpoena contemplates that Plaintiffs will physically inspect the witnesses’ workstations.

16 Plaintiffs seek to use the instant Sanctions Motion to short-circuit the Federal Rules
 17 governing third party discovery. To date, Plaintiffs have not issued subpoenas to perform on-site
 18 inspections of the workstations of Mr. Bonaparte and Mr. Williams. (*Id.*, ¶ 3.) As such, Plaintiffs’
 19 request to inspect the workstations of Mr. Bonaparte and Mr. Williams should be denied.

20 **VI. CONCLUSION.**

21 For the foregoing reasons, Sperian respectfully requests that the Court deny Plaintiffs’
 22 request for an adverse inference “that EGC failed to preserve and destroyed evidence because the
 23 evidence would be favorable to Plaintiffs, and unfavorable to Defendants.” Sperian also respectfully
 24 requests that the Court deny Plaintiffs’ request to modify the bifurcation order and deny Plaintiffs’
 25 request to inspect the workstations of Mr. Bonaparte and Mr. Williams.

1 DATED: January 6, 2020

2
3 By: /s/ Harrison Brown

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